well within the precedents.[26] The early cases, indeed, went to a length which amounted to gross injustice and for a time brought the whole doctrine into great disfavor.[27] While there is no danger of such results from applications so conservative as that made in the principal case, they point out the latent dangers of a variation based on anything but the most candid investigation of intention.

The most serious criticism of the case, however, is that the literal execution of the trust does not appear impossible. Mere insufficiency of funds has been held not to constitute an obstacle,[28] and was obviously not so considered in this case. Although the duplication of hospitals in a small town is doubtless unfortunate it would seem to introduce an element not of impossibility but of inexpediency, which is not enough to justify a departure from the original plan.

STATUS OF BORROWING MEMBERS OF A BUILDING AND LOAN ASSOCIATION.—In the case of *Trustees of Mutual Loan Ass'n.* v. *Tyre* (1911) 81 Atl. 48, lately decided in Delaware, the receiver of the plaintiff association on its insolvency sought to foreclose a mortgage given to it by the defendant, one of its shareholders, as security for an advance of money from the company's funds, for legal interest, and for the instalments of dues usually paid by all members of such organizations. In adjusting the accounts between the parties, the court correctly held that the defendant was not entitled to credit on his loan the payments of dues, which, being made equally by all shareholders on their shares, ought accordingly to be distributed *pro rata* on insolvency.[1] The problem presented, however, was complicated by the system, typical of most building and loan associations, under which these advances were made. When the sums of money paid in, aggregate the par value of a single share of stock, the association is prepared *pro tanto* to lend a member the means to buy or build his home. Since, however, all the shareholders obviously cannot be supplied at the same time, this privilege is accorded at periodical distributions to the member who will pay the highest premium therefor, or in other words, will accept the smallest amount in satisfaction of the par value of the stock upon which the advance is made. In the principal case, the defendant was credited with the full amount of the premium and interest paid.

In considering the disposition to be made of this premium, the courts have reached inconsistent views as to the nature of the transaction. Thus, the premium has been justified as being paid either for the privilege of obtaining the loan,[2] or for the unusual length of time given for satisfying the advance.[3] Again, it is sometimes urged that the whole proceeding is in fact simply a dealing in partnership funds,

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[26]Att'y Gen'l *v.* Ironmongers Co. (1834) 2 Mylne & K. 576.

[27]Mills *v.* Farmer *supra;* Moggridge *v.* Thackwell *supra.*

[28]Grand Prarie Sem. *v.* Morgan (1898) 171 Ill. 444, 450.

[1]Preston *v.* Lamano (N. Y. 1905) 46 Misc. 304, approved in Preston *v.* Reinhart (N. Y. 1905) 109 App. Div. 781, affirmed in 185 N. Y. 555; Marion Trust Co. *v.* Trustees (1899) 153 Ind. 96.

[2]See Security Loan Ass'n *v.* Lake (1881) 69 Ala. 456.

[3]See Seventeenth Ward Ass'n *v.* Fitzgerald (1901) 8 Oh. N. P. 160.

and therefore not usurious.[4] By no refinement of words, however, is it possible to escape the result, supported by the great weight of authority, that the premium is paid for one thing and for one thing alone, the use of money, and is in no material way to be distinguished from interest given for the same purpose.[5] But, in view of a further consideration, this is not sufficient to stamp it as unlawful and usurious. The dues, collected into a fund which is periodically distributed to the members according to the premium they bid, will obviously cease when the object of the association has been completed, and enough has been secured by dues and investments to furnish to each shareholder his loan of the amount which he is willing to accept in lieu of the par value of his share; and it is possible in case the venture is prosperous that all the loans will have been made and the company dissolved before the member has paid in as much as the amount of the loan plus legal interest. The uncertainty, then, whether the advance will ever be repaid in full, leads to the conclusion that the transaction is no more usurious than a contract for the payment of a life annuity in consideration of a fixed sum.[6] Of course, however, when the form of an association is used as a tool by so-called investors who have no intention of borrowing, with the result of making it a mathematical certainty that the unfortunate borrower will pay more than legal interest, he should be credited with all payments over and above the legal rate, whether the association is solvent or insolvent,[7] on the theory that the transaction is in fact a simple loan.[8] In the case of *bona fide* associations, however, the conclusion previously reached that the premium is in substance indistinguishable from interest, furnishes a step in the further solution of the question as to its disposition on foreclosure against the borrowing member. If interest, it must be treated as such. The shareholder in accepting the loan, anticipates the par value of his shares; and accordingly, if the process is not void for usury, can have no further claim upon the price he has paid. The premium has become part and parcel of the association's assets, of which the borrowing member on its dissolution is no longer entitled to a distributive share,[9] unless the assets of the company exceed the par value of the shares.

[4]Silver *v.* Barnes (1839) 6 Bing. [N. C.] 180.

[5]Ass'n *v.* Bollinger (S. C. 1860) 12 Rich. Eq. 124. In many of these jurisdictions statutes have been enacted regulating building and loan associations and exempting them from the effects of usury laws. Such statutes are generally held constitutional. See note to Spithover *v.* Jefferson Ass'n 26 L. R. A. [N. S.] 1135.

[6]Delano *v.* Wild (Mass. 1863) 6 Allen 1; Homestead Co. *v.* Linigan (1894) 46 La. Ann. 1118, 1127; see Simpson *v.* Kentucky Citizen's Ass'n (1897) 101 Ky. 496; Freeman *v.* Ottawa Ass'n (1885) 114 Ill. 182. Whether the association is a joint stock company or a corporation seems immaterial. See Patterson *v.* Workingmen's Ass'n (Tenn. 1885) 14 Lea 677, 696. Even when incorporated there is such an element of coöperation that the associations have sometimes been styled corporate partnerships. See Towle *v.* American Ass'n (1894) 61 Fed. 446.

[7]U. S. Sav. Co. *v.* Parr (1901) 26 Wash. 115; Herbert *v.* Kenton Ass'n (Ky. 1875) 11 Bush 296, 303; Kupfert *v.* Guttenberg Ass'n (1858) 30 Pa. 465.

[8]Simpson *v.* Kentucky Citizen's Ass'n *supra;* Howells *v.* Pacific Co. (1900) 21 Utah 45, 57; Lincoln Ass'n *v.* Graham (1878) 7 Neb. 173, 177; *cf.* Washington Ass'n *v.* Stanly (1901) 38 Or. 319, 335.

[9]Preston *v.* Lamano *supra.*

The denial to the mortgagor-member, under the facts of the principal case, of the right to credit any of the premium in satisfaction of his loan would, nevertheless, be so fraught with hardship as to excuse if not to justify the illogical decisions attempting to escape this result. But it is submitted that it is not necessary to be thus illogical. When a court of equity, in order to bring about the swift winding up of an insolvent building and loan association, permits a receiver to foreclose, it aids him to collect from the mortgagor-member, if he is not in default,[10] an obligation, not yet due under the agreement, in favor of an association which has failed to fulfil its contract.[11] Surely there can be no doubt that in determining the equities of the parties the court should take into consideration the damages inflicted on the shareholder by the association's inability to perform, and by the failure of the purpose with which he became a member. Evidently, if this is so, it only remains to determine the measure of his damages, which, it would seem, should properly be the difference between the actual market value of money at the time, and the amount which he actually paid. Accordingly the decision in the principal case, although perhaps not based on the strictest logic, by charging the borrower with legal interest and crediting him with premium and interest paid, approximated the correct result.[12]

TERMINATION OF EASEMENTS.—The right to exercise an easement, which is an incorporeal hereditament and an interest in land within the Statute of Frauds, arises by grant, express or implied, or by prescription. It is ordinarily terminated by a release, either actual, or presumed from some user made of the servient tenement by its owner, adverse to the enjoyment of the easement, and it may be brought to an end by the destruction of the particular property to which the easement is appurtenant, or by the happening of the contingency on which the cessation is made by the grantor to depend. Thus the grant of an easement of flowage for a specified mill comes to an end on the destruction of the mill,[1] and an easement of necessity ceases with the circumstances giving rise to it. Again, it is well settled that an easement is extinguished by the union of the dominant and servient estates in the same person, since in the nature of things one cannot have a right against his own land,[2] though where the estates in each are not coextensive in seisin, the easement is not terminated, but

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[10]While in the principal case it appeared that the defendant had not maintained his payment of instalments, the court treated him as if not in default. If the advanced member is in default credit is only given on the supposition that his interest at least equals in value the amount he has contributed. See Hale *v.* Gullick (1900) 13 S. D. 637; U. S. Ass'n's Assignee *v.* Rowland (1901) 109 Ky. 737, 743. In such a case if the association is insolvent he should be relegated to his rights as a shareholder.

[11]See Curtis *v.* Granite State Ass'n (1897) 69 Conn. 6.

[12]See Marion Trust Co. *v.* Trustees *supra;* Curtis *v.* Granite State Ass'n *supra;* Williamson *v.* Globe Co. (Tenn. 1901) 64 S. W. 298; *cf.* Towle *v.* American Ass'n *supra;* Low St. Ass'n *v.* Zucker (1877) 48 Md. 448; Preston *v.* Lamano *supra.*

[1]Day *v.* Walden (1881) 46 Mich. 575.

[2]Gayetty *v.* Bethune (1817) 14 Mass. 49.